17

(3)

No. 08-754

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD SINGLETON, RUTH SINGLETON, and AMY SINGLETON,

Petitioners,

v.

VOLKSWAGEN AG and VOLKSWAGEN OF AMERICA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

NINGUR AKOGLU
IAN CERESNEY
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, NY 10005
(212) 471-8500

BURGAIN G. HAYES
P. O. Box 10447
Austin, TX 78766
(512) 472-2193

DANNY S. ASHBY
Counsel of Record
ROBERT H. MOW, JR.
CHRISTOPHER D. KRATOVIL
K&L GATES LLP
1717 Main Street
Suite 2800
Dallas, TX 75201
(214) 939-5500

Attorneys for Respondents

220444

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether the *en banc* Fifth Circuit properly exercised its discretion in granting a writ of mandamus for failure to transfer a case under 28 U.S.C. § 1404(a) where, as the Fifth Circuit observed, the district court "gave undue weight to the Plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Volkswagen AG and Volkswagen of America, Inc. state the following:

Volkswagen of America, Inc., now known as Volkswagen Group of America, Inc., is a wholly owned subsidiary of Volkswagen AG. Porsche Automobil Holding SE, a public company, owns more than 10% of Volkswagen AG's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	vi
INTRODUCTION	1
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Proceedings in the District Court	5
C. Proceedings in the Court of Appeals	7
REASONS FOR DENYING THE PETITION	8
I. The Fifth Circuit Faithfully Adhered to This Court's Mandamus Standard, and All Circuits Agree That Mandamus May be Used as a Limited Means to Test a District Court's § 1404(a) Ruling	8
A. The Fifth Circuit Followed this Court's Mandamus Standard	8

Contents

Page

B. All Circuits Recognize the Limited Availability of Mandamus in the Context of § 1404(a) 12

II. Petitioners Concede That the Use of Mandamus to Correct Errors of Law in the Context of § 1404(a) "Is Not Controversial," But That is All That Occurred Here 13

A. The District Court Erred as a Matter of Law by Giving "Paramount Consideration" to Plaintiffs' Choice of Venue 15

B. The District Court Erred as a Matter of Law by Treating the Plaintiffs' Choice of Venue as an Independent Factor in the Venue Transfer Analysis 18

C. The District Court Erred as a Matter of Law by Applying the Stricter *Forum Non Conveniens* Dismissal Standard to a § 1404(a) Motion to Transfer Venue 20

D. The District Court Erred as a Matter of Law by Disregarding Directly On-Point Fifth Circuit Precedent ... 22

Contents

	Page
III. Mandamus is Proper if the District Court Exercises its Discretion in an Irrational or Arbitrary Manner	27
IV. The Courts of Appeals are Authorized to Use Mandamus to Supervise Their District Courts	29
CONCLUSION	35

TABLE OF CITED AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 10

Allied Chemical Corporation v. Daiflon, Inc.,
449 U.S. 33 (1980) 11

Bankers Life & Casualty Co. v. Holland,
346 U.S. 379 (1953) 11

Cessna Aircraft Co. v. Brown,
348 F.2d 689 (10th Cir. 1965) 10, 13

Cheney v. United States Dist. Ct.,
542 U.S. 367 (2004) 8, 9, 10

Chicago, Rock Island & Pac. R.R. v. Igoe,
220 F.2d 299 (7th Cir.) (*en banc*),
cert. denied, 350 U.S. 822 (1955) 12, 17

Ex Parte Chas. Pfizer & Co.,
225 F.2d 720 (5th Cir. 1955) 20

Garner v. Wolfinbarger,
433 F.2d 117 (5th Cir. 1970) 16

Gary H. v. Hegstrom,
831 F.2d 1430 (9th Cir. 1987) 33

Cited Authorities

Page

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 28

Gross v. British Broadcasting Corp.,
386 F.3d 224 (2d Cir. 2004) 17

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 18-19, 20

Henry v. I.N.S.,
74 F.3d 1 (1st Cir. 1996) 27

Hoffman v. Blaski,
363 U.S. 335 (1960) 10

Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.,
321 F.2d 53 (5th Cir. 1963) 20

In re Federal-Mogul Global, Inc.,
300 F.3d 368 (3d Cir. 2002),
cert. denied, 537 U.S. 1148 (2003) 11, 12

In re Horseshoe Entm't,
337 F.3d 429 (5th Cir.),
cert. denied, 540 U.S. 1049 (2003) ..... *passim*

In re Josephson,
218 F.2d 174 (1st Cir. 1954) 12

Cited Authorities

Page

In re National Presto Indus., Inc.,
347 F.3d 662 (7th Cir. 2003) 13, 32

In re Ralston Purina Co.,
726 F.2d 1002 (4th Cir. 1984) 12-13

In re Ricoh Corp.,
870 F.2d 570 (11th Cir. 1989) 13

In re Sealed Case,
141 F.3d 337 (D.C. Cir. 1998) 12

In re Sternberg,
85 F.3d 1400 (9th Cir. 1996) 27

In re Toyota Motor Corp. et al.,
No. 08-41323, slip op. (5th Cir. Dec. 19, 2008)
..... 30

In re TS Tech USA Corp.,
No. Misc. 888, 2008 WL 5397522
(Fed. Cir. Dec. 29, 2008) 31

In re Union Leader Corp.,
292 F.2d 381 (1st Cir.),
cert. denied, 368 U.S. 927 (1961) 12

In re Virginia Elec. & Power Co.,
539 F.2d 357 (4th Cir. 1976) 33

Cited Authorities

Page

In re Volkswagen AG,
371 F.3d 201 (5th Cir. 2004) ..... *passim*

In re Volkswagen of Am. Inc.,
223 F. App'x 305 (5th Cir. 2007) 7

In re Volkswagen of Am. Inc.,
506 F.3d 376 (5th Cir. 2007) 7

In re Volkswagen of Am. Inc.,
545 F.3d 304 (5th Cir. 2008) 7

In re Warrick,
70 F.3d 736 (2d Cir. 1995) 12

Kasey v. Molybdenum Corp.,
408 F.2d 16 (9th Cir. 1969) 13

Knight v. Alsop,
535 F.2d 466 (8th Cir. 1976) 33

La Buy v. Howes Leather Co.,
352 U.S. 249 (1957) 29, 32, 33, 34

LaSalle Nat'l Bank v. First Connecticut Holding Group, LLC.,
287 F.3d 279 (3d Cir. 2002) 33

Lemon v. Druffel,
253 F.2d 680 (6th Cir.),
cert. denied, 358 U.S. 821 (1958) 11-12, 13

Page

Lou v. Belzberg,
834 F.2d 730 (9th Cir. 1987) 17

Mallard v. United States District Ct.,
490 U.S. 296 (1989) 9, 10

Norwood v. Kirkpatrick,
349 U.S. 29 (1955) ..... *passim*

Pacific Car & Foundry Co. v. Pence,
403 F.2d 949 (9th Cir. 1968) 32

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) ..... *passim*

Reiser v. Residential Funding Corp.,
380 F.3d 1027 (7th Cir. 2004),
cert. denied, 543 U.S. 1147 (2007) 22, 32

Roche v. Evaporated Milk Ass'n,
319 U.S. 21 (1943) 32

Schlagenhauf v. Holder,
379 U.S. 104 (1964) 29

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,
549 U.S. 422 (2007) 18

Cited Authorities

Page

Sommerville v. United States,
376 U.S. 909 (1964) 3

Toro Co. v. Alsop,
565 F.2d 998 (8th Cir. 1977),
cert. denied, 435 U.S. 952 (1978) 11, 13

United States v. Burr,
25 F. Cas. 30 (C.C.D. Va. 1807) 28

United States v. Taylor,
487 U.S. 326 (1988) 10

Van Dusen v. Barrack,
376 U.S. 612 (1964) 8, 10

Veba-Chemie A.G. v. M/V Getafix,
711 F.2d 1243 (5th Cir. 1983) 21, 22

STATUTES AND RULES

28 U.S.C. § 1404(a) ..... *passim*

28 U.S.C. § 1651 33

FED. R. CIV. P. 45 ..... 24, 25

Page

OTHER AUTHORITIES

15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007) 17

15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3855 (3d ed. 2007) 13-14

17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 111.13[1][c][iii] (3d ed. 1997) 17

EUGENE GRESSMAN, *et al.*, SUPREME COURT PRACTICE (9th ed. 2007) 3

INTRODUCTION

Petitioners ask the Court to review whether a court of appeals may reverse the venue transfer decision of a district court in the "absence of any action by the district court beyond its power or jurisdiction." Pet. at i. But neither that question nor anything like it is presented in this case. Petitioners' description of the case sidesteps the actual basis for the Fifth Circuit's grant of mandamus here—*viz.*, a series of grave and recurring legal errors committed by the district court in its interpretation and application of 28 U.S.C. § 1404(a).

The Fifth Circuit, sitting *en banc*, did not grant mandamus in this case based on mere "run-of-the-mill differences in judgment of the sort that can split any two judges or courts." Pet. at 18. Nor did it grant mandamus based on some "nuanced" or "prosaic" disagreement with the district court's analysis of the facts relevant to transfer. Pet. at 17-18. Rather, the *en banc* court issued the writ because the district court committed multiple errors of law, including:

(i) erroneously "consider[ing] the plaintiffs' choice of venue as an independent factor within the venue transfer analysis," despite Supreme Court and Fifth Circuit precedent establishing that "a plaintiff's choice of forum . . . is not an independent factor within the *forum non conveniens* or the § 1404(a) analysis." App. at 19a;

(ii) incorrectly "applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue." App. at 20a; and

(iii) impermissibly "disregarding the specific precedents of" the Fifth Circuit, especially *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*In re Volkswagen I*"), a substantially similar case involving the same district court, the same legal issues and, indeed, the same defendant. App. at 28a.

The presence of these fundamental errors wholly undermines Petitioners' claim that the Fifth Circuit granted mandamus "simply because it disagreed with how the district court analyzed and weighed the [§ 1404(a)] factors, and with the outcome of its discretionary balancing." Pet. at 3. As the *en banc* court held, the presence of these extraordinary legal errors produced "a patently erroneous result" warranting correction by mandamus. App. at 28a-29a. Even by Petitioners' account, the use of mandamus in such situations "is not controversial." Pet. at 11.

While circuit courts have employed different verbal formulations of the standard for mandamus under § 1404(a)—and certainly have expressed disagreement about the use of mandamus in § 1404(a) cases at the margins—those differences are wholly immaterial to the issues in this case and thus raise nothing warranting

this Court's plenary review. *See* EUGENE GRESSMAN, *et al.*, SUPREME COURT PRACTICE at 248 (9th ed. 2007) (citing *Sommerville v. United States*, 376 U.S. 909 (1964) (certiorari denied despite existence of circuit conflict where petitioner would be liable regardless of how conflict was resolved)). Because *all* circuits endorse use of the writ in the face of legal error, there simply is no split among the circuits pertinent to the resolution of this case.

Beyond that, employing mandamus to prevent a pattern of persistent or repeated error by a district court is critical to the supervisory authority of the courts of appeals, and has been expressly authorized by this Court. No case establishes that a district court may fail to follow binding circuit court precedent in making a § 1404(a) transfer decision. There is thus no division of authority even arguably warranting review in this case.

STATEMENT OF THE CASE

A. Factual Background

On the morning of Saturday, May 21, 2005, Dallas County resident Colin Little was traveling at highway speeds on Interstate 635 in Dallas when his Chrysler 300 struck the left rear of a Volkswagen Golf driven by Ruth Singleton. App. at 2a; VW App. at 16a, 28a-30a.[1] The collision spun the Golf around and propelled its left rear quarter into a flat-bed trailer parked along the

[1] Citations to "VW App." are to the evidentiary appendix that Volkswagen filed in the court of appeals in support of its petition for writ of mandamus. The Singletons cite to this appendix extensively in their Petition.

shoulder of the freeway.[2] App. at 2a, 50a. These two separate and violent rear impacts caused extensive damage to the Golf and catastrophically injured two passengers, Richard Singleton and Mariana Singleton. App. at 2a, 50a; VW App. at 29a. Dallas County residents witnessed the accident. App. at 3a, 51a; VW App. 65a-67a. Dallas emergency personnel responded at the scene and transported Richard and Mariana to Dallas hospitals for treatment. App. at 3a, 51a; VW App. at 30a. Mariana, a seven year old, died from her injuries at Children's Medical Center in Dallas. An autopsy was performed on her by a Dallas physician. App. at 3a, 51a; VW App. at 28a-30a. Richard Singleton was treated at Parkland Hospital in Dallas. VW App. at 4a. Dallas police investigated the accident and filed reports in their offices. App. at 3a, 51a; VW App. at 46a-59a, 63a-64a. The damaged Volkswagen Golf—which Mariana's mother, Amy Singleton, purchased from a Dallas County dealership—App. at 3a, 51a; VW App. at 28a, 45a—is now and has been held as evidence in Dallas County.

---

[2] In an effort to identify some connection between this case and their preferred venue, Petitioners point out that "[t]he trailer was owned by a local nursery located in Denton County, also adjacent to Dallas County and in the Eastern District, and was driven by its employee." Pet. at 5. What Petitioners fail to note is that the "employee," John Soto, was a resident of Dallas County in the Northern District of Texas. Mr. Soto had parked along the freeway shoulder to assist his wife, Irene Soto, in changing a flat tire on her vehicle. VW App. at 61a, 129a-131a. Mr. and Mrs. Soto are the two eye-witnesses to the accident, and they both reside in Dallas County in the Northern District of Texas. Mrs. Soto submitted an affidavit stating that it would be an "unreasonable burden and hardship" and an "inconvenience" for her "to be required to travel 160 miles from [her] residence to Marshall, Texas to testify in a trial of this matter." VW App. 65a-67a.

B. Proceedings in the District Court

Petitioners did not sue the driver who struck them, Mr. Little. Nor did they sue in the Northern District of Texas where the accident occurred. Instead, they filed suit against Volkswagen some 155 miles away near the Texas-Louisiana border in the Marshall Division of the Eastern District of Texas, alleging that improper seat design caused the injuries to Richard and Mariana Singleton.

Contrary to the impression conveyed in the Petition (at 5-6), the Eastern District of Texas was *not* the home of any of the Petitioners at the time that they filed suit, or at any point during this litigation. Although Petitioners previously had lived in the Dallas suburb of Plano, which falls within the Sherman Division of the Eastern District of Texas, two of the Petitioners are residents of Dallas in the Northern District of Texas, while the third Petitioner is a resident of Kansas. App. at 26a; VW App. at 16a, 23a, 60a-62a, 145a-149a. No party or known witness has ever resided in the Marshall Division of the Eastern District of Texas.[3]

---

[3] Petitioners assert, with no evidence, that "Mariana's teachers, neighbors and friends, who could provide damages-related testimony about her life, reside in the Eastern District in Collin County." Pet. at 6. This hypothetical set of suburban Dallas witnesses in no way supports the relative convenience of Marshall over Dallas. Any of Mariana Singleton's Plano-based "teachers, neighbors and friends" obviously would find it far more convenient to attend a trial in the immediately adjacent city of Dallas (less than 20 miles away), rather than traveling 155 miles into rural East Texas to testify in Marshall.

In response to the Singletons' suit against it, Volkswagen promptly joined Little as a responsible third party. App. 3a; VW App. at 102a-105a. Under Texas' comparative fault scheme, the facts regarding both Mr. Little's actions and the resulting accident are of critical importance to Volkswagen's defense that Mr. Little's negligent acts, rather than any alleged design defect, were directly and exclusively responsible for the injuries suffered by Petitioners.[4]

After adding Mr. Little as a third-party defendant, Volkswagen moved, pursuant to 28 U.S.C. § 1404(a), to transfer venue to the Dallas Division of the Northern District of Texas as the clearly more convenient forum. App. at 3a; VW App. at 14a-26a and 27a-69a. In its motion, Volkswagen explained and presented evidence that none of the parties or witnesses reside in the Eastern District, none of the relevant events took place there, no evidence is stored there, and no party or relevant witness has any connection to the Marshall Division. VW App. at 14a-15a. The only connection between this case and the Marshall Division is that Plaintiffs chose to file suit there. VW App. 18a-19a.

The district court denied Volkswagen's motion to transfer, holding that "[t]he plaintiff's choice of forum is a 'paramount consideration in any determination of [a] transfer request, and that choice should not be lightly disturbed.'" App. at 85a. Volkswagen promptly sought

---

[4] In view of Volkswagen's comparative fault defense, Petitioners' suggestion that "the basic facts of how the collision occurred" are neither "contested" nor particularly relevant is misleading. Pet. at 4.

reconsideration (VW App. at 106a-136a), which the district court also denied. App. at 78a-81a.

C. Proceedings in the Court of Appeals

Volkswagen petitioned the Fifth Circuit for a writ of mandamus. On February 13, 2007, in a 2-1 decision, a panel of the Fifth Circuit declined to grant mandamus. *In re Volkswagen of Am. Inc.*, 223 F. App'x 305 (5th Cir. 2007) (App. at 73a-75a). Volkswagen filed a petition for rehearing *en banc*. On April 23, 2007, the original panel treated the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the petition to be scheduled for argument. Following oral argument, a second panel of the Fifth Circuit voted unanimously to grant the writ. *In re Volkswagen of Am. Inc.*, 506 F.3d 376 (5th Cir. 2007) (App. 49a-75a). The Singletons then successfully petitioned for rehearing *en banc*. On October 10, 2008, the *en banc* Fifth Circuit issued a 10-7 decision granting the writ of mandamus and ordering this case transferred from the Marshall Division of the Eastern District of Texas to the Dallas Division of the Northern District of Texas. *In re Volkswagen of Am. Inc.*, 545 F.3d 304 (5th Cir. 2008) (App. 1a-48a).

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit Faithfully Adhered to This Court's Mandamus Standard, and All Circuits Agree That Mandamus May be Used as a Limited Means to Test a District Court's § 1404(a) Ruling

The Singletons contend that this Court's standard for granting mandamus precludes using the writ to correct a "clear abuse of discretion"—as distinct from a "jurisdictional" error—in the district court's application or interpretation of § 1404(a). Pet. at 15-18. The Singletons also argue that this Court should grant certiorari in order to resolve a purported circuit split concerning the "use of mandamus to address claimed abuses of discretion in [§ 1404(a)] transfer motions." Pet. at 20. Neither argument withstands scrutiny.

A. The Fifth Circuit Followed this Court's Mandamus Standard

The Singletons correctly note that this Court has never specifically held that mandamus is an available remedy in the context of § 1404(a). *See Van Dusen v. Barrack*, 376 U.S. 612, 614-15 (1964) (declining to reach the issue); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (same). But nor has the Court ever placed the exercise of a district court's discretion under § 1404(a) beyond the confines of mandamus review. Moreover, the Court, as a general matter, has expressly sanctioned use of mandamus in "exceptional circumstances" amounting to "a clear abuse of discretion." *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004). As the Court explained, "[a]lthough we have not limited the use of

mandamus by an unduly narrow and technical understanding of what constitutes a matter of jurisdiction, we have required that petitioners demonstrate a clear abuse of discretion or conduct amounting to the usurpation of the judicial power, to be entitled to the writ." *Mallard v. United States District Ct.*, 490 U.S. 296, 309 (1989) (compiling cases, citations and internal quotation marks omitted). The Singletons are urging a retreat to precisely the sort of "technical understanding of what constitutes a matter of jurisdiction" that this Court rejected in *Mallard*.

Mandamus is proper if the district court either commits a "clear abuse of discretion" or engages in "conduct amounting to the usurpation of the judicial power." *Id.*; *Cheney*, 542 U.S. at 380 (same). This is the exact standard that the Fifth Circuit applied, and that it found Volkswagen satisfied. App. 7a-11a. Confirming its fidelity to this standard, the Fifth Circuit stressed emphatically that "in no case will we replace a district court's exercise of discretion with our own; we review only for clear abuses of discretion that produce patently erroneous results." App. at 14a. Consistent with *Cheney* and *Mallard*, the Fifth Circuit acknowledged throughout its opinion that mandamus is an "extraordinary remedy" and properly imposed the burden on Volkswagen to demonstrate its "clear and indisputable" entitlement to the writ. App. at 10a-11a, 28a; *Cheney*, 542 U.S. at 380-81; *Mallard*, 490 U.S. at 309. The Fifth Circuit correctly articulated and applied this Court's mandamus standard, recognizing that its "'hurdles, however demanding, are not insuperable.'" App. at 11a (quoting *Cheney*, 542 U.S. at 381).

The Singletons make much of the fact that the § 1404(a) determination is committed to the discretion of the district court, contending that this insulates the district court's transfer decision from mandamus regardless of how arbitrary the exercise of that discretion may have been. Pet. at 3 and 17-19. But the mere fact that a district court possesses discretion does not mean that it is unbounded by legal guidelines. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (noting that a decision calling for the exercise of discretion "hardly means that it is unfettered by meaningful standards"); *United States v. Taylor*, 487 U.S. 326, 336 (1988) ("Whether discretion has been abused depends, of course, on the bounds of that discretion and the principles that guide its exercise." (quotations and citations omitted)). At a minimum, the trial court's discretion is cabined by the text of the relevant statute—here, § 1404(a)—by precedents of this Court, and by precedents of the relevant circuit court of appeals.

As *Cheney* and *Mallard* establish, a district court can so clearly abuse its discretion as to require correction via mandamus. *Cheney*, 542 U.S. at 380; *Mallard*, 490 U.S. at 309. Nothing in this Court's jurisprudence contains any hint that the use of mandamus by circuit courts to police and correct a trial court's "clear abuse of discretion" is forbidden in the context of § 1404(a). The Tenth Circuit, in fact, has explicitly invoked this Court's decisions to support the conclusion that "[m]andamus is an appropriate remedy to test the validity of the transfer order." *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 n.2 (10th Cir. 1965) (citing *Hoffman v. Blaski*, 363 U.S. 335 (1960) and *Van Dusen*, 376 U.S. at 615 n.3).

Contrary to the contention advanced in the Petition (at 15-17), the Court's decisions in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), and *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980), do not establish a different rule. In *Bankers Life*, the Court expressly recognized the propriety of mandamus in "exceptional circumstances where there is a clear abuse of discretion," and held only that the court of appeals correctly declined to grant mandamus "in the circumstances of th[at] case." 346 U.S. at 382. Moreover, *Allied Chemical* involved the wholly unrelated question of whether a district court order granting a new trial could be overturned by mandamus. 449 U.S. at 191.

Despite numerous opportunities to do so over five decades, the Court has never granted certiorari to bar the use of mandamus in the context of § 1404(a). *See, e.g.*, *In re Horseshoe Entm't*, 337 F.3d 429, 431-32 (5th Cir.) (granting mandamus to compel a transfer of venue and "recogniz[ing] the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders."), *cert. denied*, 540 U.S. 1049 (2003); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (holding that "we, like other courts, have held that mandamus is the appropriate mechanism for reviewing an allegedly improper transfer order."), *cert. denied*, 537 U.S. 1148 (2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977) (conducting "an inquiry as to 'whether the district court's action under § 1404(a) was shown to be without any possible basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility.'"), *cert. denied*, 435 U.S. 952 (1978); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.)

(holding that the court of appeals has power to issue writs of mandamus to correct abuses of discretion under § 1404(a)), *cert. denied*, 358 U.S. 821 (1958); *Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 304 (7th Cir.) (*en banc*) (granting a writ of mandamus under § 1404 because "[t]he balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case . . . was so clearly erroneous that it amounted to an abuse of discretion."), *cert. denied*, 350 U.S. 822 (1955). Petitioners have presented no reason for the Court to do so now.

B. All Circuits Recognize the Limited Availability of Mandamus in the Context of § 1404(a)

Nor, upon examination, is the circuit split urged by the Singletons relevant to the decision in this case. While the circuit courts may vary in their formulations of standards and/or their willingness to grant the writ in a given case, they all agree that mandamus may be appropriate in the § 1404(a) context. The *en banc* Fifth Circuit noted exactly this point at the outset of its opinion, citing cases from every court of appeals for the proposition that mandamus is available "as a limited means to test the district court's discretion in issuing transfer orders." App. at 7a, n.3 (citing *In re Sealed Case*, 141 F.3d 337, 340 (D.C. Cir. 1998); *In re Josephson*, 218 F.2d 174, 183 (1st Cir. 1954), *abrogated on other grounds by In re Union Leader Corp.*, 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *In re Warrick*, 70 F.3d 736, 740 (2d Cir. 1995); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re Ralston Purina Co.*,

726 F.2d 1002, 1005 (4th Cir. 1984); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *In re National Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Kasey v. Molybdenum Corp.*, 408 F.2d 16, 19-20 (9th Cir. 1969); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 692 (10th Cir. 1965); *In re Ricoh Corp.*, 870 F.2d 570, 573 n. 5 (11th Cir. 1989)). While the courts of appeals certainly may decline to grant mandamus under the circumstances of a particular § 1404(a) case, no circuit has imposed a blanket prohibition on the use of mandamus in venue transfer cases. Moreover, because the Fifth Circuit granted mandamus based on "extraordinary errors" of law far exceeding a simple reweighing of the transfer factors, this case does not even remotely present the question of whether such a mere reweighing of the transfer factors would provide an adequate basis for mandamus. *See* App. at 28a.

II. Petitioners Concede That the Use of Mandamus to Correct Errors of Law in the Context of § 1404(a) "Is Not Controversial," But That is All That Occurred Here

Petitioners' principal claim is that the Fifth Circuit improperly granted mandamus "for no other reason than that it disagreed with" the district court's legitimate exercise of its discretion under 28 U.S.C. § 1404(a). Pet. at 19. But the Singletons concede that, in the context of § 1404(a), "mandamus is not controversial 'if the issue goes to the power of the district court to make the order it did and *only a question of law is presented*.'" Pet. at 11-12 (emphasis added) (quoting 15 CHARLES A. WRIGHT, ARTHUR R.

MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3855 at 325 (3d ed. 2007)). They further acknowledge that "[a]lmost all courts agree that the writ [of mandamus] can be used *if the trial court made an error of law*, as by . . . considering an impermissible factor in passing on the motion . . . ." Pet. at 12 (emphasis added) (quoting 15 WRIGHT, MILLER & COOPER § 3855 at 330). Thus, by its own terms, the merit of the Singletons' petition stands or falls on its claim that this is *not* a case involving an "error of law" by the district court resulting in the misapplication of § 1404(a). *See* Pet. at 14.

Yet, in granting mandamus, the *en banc* Fifth Circuit identified not one, but multiple material legal errors committed by the district court:

> The errors of the district court—applying the stricter *forum non conveniens* dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, treating choice of venue as a § 1404(a) factor, misapplying the *Gilbert* factors, disregarding the specific precedents of this Court in *In re Volkswagen I*, and glossing over the fact that not a single relevant factor favors the Singletons' chosen venue—were extraordinary errors.

App. at 28a.

Rather than confront the specific legal errors identified by the Fifth Circuit, Petitioners instead try to recast the Fifth Circuit's holding as an improper interference with the district court's discretion by

"appellate judges [who] . . . cannot help themselves and think it essential that they plunge in to make sure the case is tried in their preferred forum." Pet. at 30a. But examination of the district court's orders denying Volkswagen's transfer motion confirms the multiple legal errors identified by the Fifth Circuit, and refutes Petitioners' argument that the *en banc* Fifth Circuit baselessly interfered with a legitimate exercise of the district court's discretion.

A. The District Court Erred as a Matter of Law by Giving "Paramount Consideration" to Plaintiffs' Choice of Venue

Neither the district court nor the Petitioners have ever identified *any* factor favoring the relative convenience of trying this case in Marshall instead of Dallas. The sole basis for the district court's refusal to transfer venue from Marshall to Dallas was Petitioners' preference for litigating there. App. at 28a. Indeed, in denying Volkswagen's motion to transfer, the district court declared that plaintiffs' choice of forum is "a paramount consideration in any determination of [a] transfer request."[5] App. at 85a.

---

[5] In its order denying Volkswagen's motion for reconsideration, the district court backed away from the language in its earlier order (App. at 85a) and denied that it had given "decisive weight" to the Plaintiffs' choice of forum. App. at 79a. But given the failure of the district court to point to *any* § 1404(a) factor making venue more convenient in Marshall than in Dallas (App. at 78a-81a and 82a-93a), no other conclusion is possible.

The district court erred as a matter of law in giving "paramount consideration" to the Singletons' choice of venue. This Court has long held that a plaintiff's "forum choice should not be given dispositive weight." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, at 258 n.23 (1981). While *Piper Aircraft* is a *forum non conveniens* case, its reasoning is even more applicable in the context of § 1404(a), where the Court has indicated transfers may be made on a lesser showing of inconvenience. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (stating that "Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience" than is required by the common law of *forum non conveniens*). Consistent with this Court's precedents, the Fifth Circuit—whose holdings are, of course, binding on the trial court in question—emphasized in earlier cases that a plaintiff's choice of forum "in and of itself is neither conclusive nor determinative" of the § 1404(a) transfer analysis. *In re Horseshoe Entm't*, 337 F.3d at 431-32; *In re Volkswagen I*, 371 F.3d at 203 (no venue factor is to be "given dispositive weight."); *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970).

Not only was the district court's assignment of "paramount" importance to the plaintiff's choice of venue in direct conflict with this Court's and the Fifth Circuit's precedents, it also was singularly inapposite in the circumstances of this case. Where a venue is not the home of a party, the site of the events leading to the litigation, or otherwise connected to the case, multiple circuit courts have held that a plaintiff's choice of that

venue is, at most, entitled to minimal deference.[6] Leading treatises echo this conclusion,[7] and there does not appear to be any authority to the contrary. Thus, even the lone consideration that purportedly warranted keeping this case in Marshall—Petitioners' desire to litigate there—was, at most, entitled only to minimal weight.

---

[6] *See, e.g., Gross v. British Broadcasting Corp.*, 386 F.3d 224, 230 (2d Cir. 2004) ("The degree of deference to the plaintiff's forum depends in part on a number of considerations, such as the plaintiff's own connection to that forum."); *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [plaintiff's] choice is entitled to only minimal consideration."); *Chicago, Rock Island & Pac. R.R.*, 220 F.2d at 304 (holding that "[t]his factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff."). While other circuits have not reached this issue, district courts in literally every circuit have concluded that a plaintiff's choice of venue unconnected to the parties or events of a case is entitled to minimal or no deference.

[7] *See* 15 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3848 (3d ed. 2007) ("plaintiff's venue choice is to be given less weight if he or she selects a district court with no obvious connection to the case or the plaintiff is a non-resident of the chosen forum or neither element points to that court."); 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, § 111.13[1][c][iii] (3d ed. 1997) ("When the chosen forum is neither the plaintiff's residence nor the place where the operative events occurred, the court is likely to override the plaintiff's choice, unless the plaintiff can show some other valid reason supports the plaintiff's choice of forum.").

In the face of multiple precedents to the contrary, the district court committed a significant legal error by affording "paramount consideration" to the Singletons' choice of venue. Thus, even under Petitioners' articulation of the mandamus standard—*i.e.*, that the writ "can be used if the trial court made an error of law" (Pet. at 12)—the Fifth Circuit acted well within its discretion granting mandamus here.

B. The District Court Erred as a Matter of Law by Treating the Plaintiffs' Choice of Venue as an Independent Factor in the Venue Transfer Analysis

The district court committed a separate legal error by treating the Plaintiffs' choice of venue as an independent factor in its venue transfer analysis. App. at 19a, n.10, 79a, and 84a-86a. While a plaintiff's choice of venue certainly is accorded deference, it is not a distinct factor in the § 1404(a) analysis. The Fifth Circuit explained:

> A plaintiff's choice of forum . . . is not an independent factor within the *forum non conveniens* or the § 1404(a) analysis. In fact, the Supreme Court has indicated that a plaintiff's choice of forum corresponds to the burden that a moving party must meet: "A defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 127 S.Ct. 1184, 1191, 167 L.Ed.2d 15 (2007) (emphasis added); *see also Gilbert*, 330

> U.S. at 507, 67 S.Ct. 839 (indicating the convenience factors and then noting "[b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"). Although a plaintiff's choice of venue is not a distinct factor in the venue transfer analysis, it is nonetheless taken into account as it places a significant burden on the movant to show good cause for the transfer.

App. at 19a, n. 10.

"Plaintiff's choice of venue" simply is not among the transfer factors set out by this Court in the *forum non conveniens* context. *See Piper Aircraft*, 454 U.S. at 241 n. 6; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).[8]

---

[8] In *forum non conveniens* cases, the private interest factors examined by the Court are: (i) "the relative ease of access to sources of proof;" (ii) "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;" (iii) "possibility of view of premises, if view would be appropriate to the action;" and (iv) "all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508. The public factors are: (i) "the administrative difficulties flowing from court congestion;" (ii) "the 'local interest in having localized controversies decided at home';" (iii) "the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action;" (iv) "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law;" and (v) "the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft*, 454 U.S. at 241 n.6 (citing *Gilbert*, 330 U.S. at 509).

And the Court has indicated that these same *forum non conveniens* factors are to be considered in evaluating § 1404(a) motions to transfer venue. *See Norwood*, 349 U.S. at 32. Accordingly, the Fifth Circuit, like other circuit courts, has explicitly "adopted the *Gilbert* factors, which were enunciated in *Gilbert* for determining the *forum non conveniens* question, for determining the § 1404(a) venue transfer question." App. at 18a, n.9 (citing *Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963)); *Ex Parte Chas. Pfizer & Co.*, 225 F.2d 720, 721-22 (5th Cir. 1955).

Again, Petitioners concede that a writ of mandamus "can be used if the trial court made an error of law . . . as by considering an impermissible factor in passing on the motion. . . ." Pet. at 12. That is precisely what happened here, as the district court erroneously added "the plaintiff's choice of forum" to the *Gilbert* factors, thereby giving inordinate weight to the plaintiff's choice of venue.

C. The District Court Erred as a Matter of Law by Applying the Stricter *Forum Non Conveniens* Dismissal Standard to a § 1404(a) Motion to Transfer Venue

This Court has established that § 1404(a) venue transfers may be granted "upon a lesser showing of inconvenience" than *forum non conveniens* dismissals. *Norwood*, 349 U.S. at 32. *See also Piper Aircraft*, 454 U.S. at 254 (noting the "relaxed standards for transfer" under § 1404(a)). As a result of *Norwood*, the Fifth Circuit has long held that the "heavy burden traditionally imposed upon defendants by the *forum non*

conveniens doctrine—dismissal permitted only in favor of a substantially more convenient alternative—was dropped in the § 1404(a) context." *Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1247 (5th Cir. 1983). To obtain a "new federal [venue]," the court observed, "the statute requires only that the transfer be '[f]or the convenience of the parties, in the interest of justice.'" *Id.* (first alteration added, citation omitted).

In evaluating Volkswagen's motion, though, the district court ignored *Piper Aircraft's* "relaxed standards for transfer" under § 1404(a) and instead demanded that Volkswagen "show that 'the balance of convenience and justice *substantially* weighs in favor of transfer." App. at 85 (emphasis in original). Again, the district court applied the wrong legal standard. Lacking any factor favoring the relative convenience of Marshall over Dallas, the district court denied transfer only by imposing an incorrect standard and an elevated burden on Volkswagen. The Fifth Circuit expressly identified this error by the district court:

> [T]he district court, in requiring Volkswagen to show that the § 1404(a) factors must substantially outweigh the plaintiffs' choice of venue, erred by applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs' choice of venue.

App. at 20a.

It was serious legal error for the district court to ignore the important differences between a statutory convenience transfer and a dismissal under the law of *forum non conveniens*. *See Norwood*, 349 U.S. at 32; *Veba-Chemie*, 711 F.2d at 1247. Combined with its other legal errors, the district court's improper invocation and application of the *forum non conveniens* standard undercuts Petitioners' contention that "the court of appeals simply revisited the district court's conclusions on each of the § 1404(a) factors, reached a different judgment about them, and ordered the transfer." Pet. at 18.

D. The District Court Erred as a Matter of Law by Disregarding Directly On-Point Fifth Circuit Precedent

It is axiomatic that a district court does not enjoy "discretion" to disregard on-point circuit precedent. *See, e.g.*, *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not we agree with them, so district judges must follow the decisions of this court whether or not they agree." (internal citations omitted)), *cert. denied*, 543 U.S. 1147 (2007). Yet, in addition to the legal errors already identified (*ante* at 13-22), the district court here committed several other legal errors by refusing to apply the § 1404(a) transfer standards expressly established by the Fifth Circuit in its recent precedents. *In re Volkswagen I*, 371 F.3d 201; *In re Horseshoe*, 337 F.3d at 431-32. In particular, the district court impermissibly broke with controlling circuit

precedent by failing to apply at least four separate requirements necessary for a proper § 1404(a) analysis under Fifth Circuit law.

1. The district court erred by treating the more than 155-mile distance between Dallas and Marshall as "not substantial" and even "negligible." App. at 87a-88a, 79a. This holding ignored the Fifth Circuit's unambiguous directive that any distance of "more than 100 miles" must be considered when analyzing § 1404(a)'s witness convenience factor. *In re Volkswagen I*, 371 F.3d at 204-05. The *en banc* Fifth Circuit expressly identified the district court's disregard for this precedent concerning distance as part of the basis for mandamus:

> In *In re Volkswagen I* we set a 100-mile threshold as follows: "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." 371 F.3d at 204-05. We said, further, that it is an "obvious conclusion" that it is more convenient for witnesses to testify at home and that "[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment." *Id.* at 205. The district court disregarded our precedent relating to the 100-mile rule.

App. 25a-26a.

2. The district court similarly ignored the Fifth Circuit's precedent concerning the "availability of compulsory process" factor in the § 1404(a) analysis. Just as in *In re Volkswagen I*, all non-party witnesses located in the city where the collision occurred "are outside the Eastern District's subpoena power for deposition under FED. R. CIV. P. 45(c)(3)(A)(ii)." *In re Volkswagen I*, 371 F.3d at 205, n.4. Moreover, as in *In re Volkswagen I*, any "trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash under FED. R. CIV. P. 45(c)(3)." *Id.* at 205, n.4. Despite this recent and directly on-point precedent arising from a substantially identical case, the district court twice concluded that "this factor does not weigh in favor of transfer." App. at 89a and 80a. The Fifth Circuit held that the district court's lack of fidelity to controlling circuit law on this factor constituted further error. App. at 23a.

3. The district court also erred by holding that the "ease of access to sources of proof" factor under § 1404(a) has been rendered superfluous "because of advances in copying technology and information storage." App. at 90a. The district court was not within its discretion to invalidate a § 1404(a) factor established by this Court and recently reiterated by the Fifth Circuit in *In re Volkswagen I*, 371 F.3d at 203 (citing *Piper Aircraft*, 454 U.S. at 241, n.6). While the precise degree of weight to which this factor is entitled obviously varies from case to case, the district court was not permitted to simply read it out of the § 1404(a) equation.

4. Most significantly, the district court erred as a matter of law by holding that the "local interest" factor

did not support transfer to Dallas because the "citizens of Marshall also have an interest in this products liability case" and "the product is available in Marshall."[9] App. at 91a. The Fifth Circuit squarely rejected identical reasoning in *In re Volkswagen I*, finding that

> [p]laintiffs have failed to demonstrate and the Eastern District court has failed to explain how the citizens of the Eastern District of Texas, where there is no factual connection with the events of this case, have more of a localized interest in adjudicating this proceeding than the citizens of the Western District of Texas, where the accident occurred and where the entirety of the witnesses for the third-party complaint can be located.

In re Volkswagen I, 371 F.3d at 206. The *en banc* Fifth Circuit was therefore brusquely critical of the district court's decision to again rely on that reasoning:

> The only contested public interest factor is the local interest in having localized interests decided at home. Here, the district court's reasoning again disregarded our precedent in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer. *Id.* at 205-06. Here again, this factor weighs heavily in favor of transfer . . . . In short, there is no relevant factual connection to the Marshall Division.

---

[9] As the Fifth Circuit pointed out, there is not, in fact, a Volkswagen dealership located in the Marshall Division of the Eastern District of Texas. App. at 27a, n.13.

> Furthermore, the district court's provided rationale—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretches logic in a manner that eviscerates the public interest that this factor attempts to capture. The district court's provided rationale could apply virtually to any judicial district or division in the United States; it leaves no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. That the residents of the Marshall Division "would be interested to know" whether a defective product is available does not imply that they have an interest—that is, a stake—in the resolution of this controversy. Indeed, they do not, as they are not in any relevant way connected to the events that gave rise to this suit. In contrast, the residents of the Dallas Division have extensive connections with the events that gave rise to this suit. Thus, the district court erred in applying this factor as it also weighs in favor of transfer.

App 26a-27a. By refusing to follow *Volkswagen I* on this additional issue, the district court again erred as a matter of law.

III. Mandamus is Proper if the District Court Exercises its Discretion in an Irrational or Arbitrary Manner

Glossing over the multiple legal errors committed by the district court, Petitioners contend that mandamus was improper here because the trial court's decision "considered and applied all the traditional factors governing § 1404(a) motions." Pet. at 3. Of course, even if the district court did consider all of the proper factors and no improper ones—a contention wholly unsupported by the record[10]—the legitimate exercise of a district court's discretion involves more than merely quoting the correct legal principles. *See, e.g., Henry v. I.N.S.*, 74 F.3d 1, 4 (1st Cir. 1996) ("We have pointed out that courts can abuse discretion in any of three aspects, namely, by neglecting to consider a significant factor that appropriately bears on the discretionary decision, by attaching weight to a factor that does not appropriately bear on the decision, or by assaying all the proper factors and no improper ones, but nonetheless making a clear judgmental error in weighing them.") *In re Sternberg*, 85 F.3d 1400, 1405 (9th Cir. 1996) ("A trial court abuses its discretion if it fails to apply the correct law or if it bases its decision on a clearly erroneous finding of a material fact. A trial court also abuses its discretion if it applies the correct

---

[10] As discussed *ante*, the district court improperly treated the Plaintiffs' choice of venue as "a paramount consideration." App. at 85a. It compounded this error by classifying the Plaintiffs' choice of venue as a free-standing and independent factor in the § 1404(a) analysis. *Id.* Petitioners are therefore wrong that the district court correctly considered the proper § 1404(a) factors and no improper ones.

law to facts which are not clearly erroneous but rules in an irrational manner."). Whenever discretion is conferred, there is always the implied condition that the trial court must exercise its power within limits. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996) ("We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.").

A district court cannot simply pay lip service to the appropriate legal standard even as it refuses to be guided by that standard. Quite apart from the district court's many legal errors, neither the district court nor Petitioners have ever identified a single consideration making Marshall more convenient than Dallas. As the Fifth Circuit explained, "[t]he only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there." App. at 28a. That Dallas is the more convenient venue for this case is both obvious and irrefutable. The connections between this case and Dallas are overwhelming, while the connections between this case and Marshall are nonexistent. The district court's mere reference to the proper legal standard counts for little where, as here, it fails to rationally apply that standard.

The "clear abuse of discretion" standard does not confer immunity on the trial court's rulings. As Chief Justice Marshall put it, discretionary choices are left not to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807)

(No. 14692D). This axiom precisely states the standard applied by the *en banc* Fifth Circuit, and certainly does not warrant plenary review by this Court.

IV. The Courts of Appeals are Authorized to Use Mandamus to Supervise Their District Courts

While Petitioners argue that the writ of mandamus may be used only to "ensure [district courts] do not exceed their jurisdiction," this Court has held that the writ also may issue to supervise and control district courts. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964). Most notably, in *La Buy*, the Court recognized unequivocally that "supervisory control of district courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259-60. The Court added that "[t]he All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus." *Id.* Far from limiting the use of the writ, *La Buy* indicates that the courts of appeals have discretion in the use of mandamus, especially in circumstances where the district court commits persistent error. *Id.* at 255, 258 ("[T]here is an end of patience and it clearly appears that the Court of Appeals has for years admonished the trial judges of the Seventh Circuit that the practice of making reference 'does not commend itself' and 'should seldom be made, and if at all only when unusual circumstances exist.'") (internal quotations omitted).

The history of § 1404(a) transfer decisions by this particular district court confirms why the Fifth Circuit was within its discretion in granting mandamus here.

In 2003, the Fifth Circuit clarified its venue transfer jurisprudence, providing substantial guidance to the district courts on the proper adjudication of transfer motions. *See In re Horseshoe Entm't*, 337 F.3d 429, 431-32 (5th Cir.), *cert. denied*, 540 U.S. 1049 (2003). However, this district court did not follow the Fifth Circuit's instructions in *In re Horseshoe* which, in turn, led to the Fifth Circuit's grant of mandamus in *In re Volkswagen I*, 371 F.3d 201 (5th Cir. 2004). There, the Fifth Circuit spelled out in even more detail how to properly evaluate § 1404(a) transfer motions. In the present case, the district court again did not apply several of the core principles of *In re Horseshoe* and *In re Volkswagen I*. *Ante* at 23-27. The district court's failure to follow these on-point precedents again required correction by mandamus from the Fifth Circuit, which, this time, the Court chose to issue *en banc*. App. at 23a-28a.

To date, even the guidance from the *en banc* court has not been enough to break this pattern of error, as the Fifth Circuit recently issued a writ of mandamus in yet another substantially identical § 1404(a) case decided by this district court. *See In re Toyota Motor Corp. et al.*, No. 08-41323, slip op. at 1 (5th Cir. Dec. 19, 2008) (granting mandamus based on the district court's failure to follow the *en banc* Fifth Circuit's holding in *In re Volkswagen II*).

The Fifth Circuit is not alone in holding that this district court has clearly abused its discretion in interpreting and applying § 1404(a). Just two weeks ago, the Federal Circuit issued a writ of mandamus, concluding that the district court "disregarded Fifth

Circuit precedent" in denying a § 1404(a) venue transfer motion in an intellectual property case. *In re TS Tech USA Corp.*, No. Misc. 888, 2008 WL 5397522, at *4 (Fed. Cir. Dec. 29, 2008). The Federal Circuit faulted the district court for returning to reasoning that "was unequivocally rejected by the Fifth Circuit in *Volkswagen I* and *Volkswagen II*."[11] *Id.* at *4. The Federal Circuit also noted that the district court "ignored Fifth Circuit precedent in assessing the cost of attendance for witnesses," failed to apply "Fifth Circuit precedent [that] clearly forbids treating the plaintiff's choice of forum as a distinct factor in the § 1404(a) analysis," and "disregarded Fifth Circuit precedent in analyzing the public interest in having localized interests decided at home." *Id.* at *3-4. In sum, the Federal Circuit corrected a substantially identical clear abuse of discretion by the district court and, like the Fifth Circuit, corrected it by mandamus.

By now, this pattern of error on § 1404(a) questions has become familiar to the courts of appeals: the district court declines to transfer venue away from Marshall by giving too much weight to the plaintiff's choice of venue, while unduly minimizing the inconvenience of litigating in a venue completely unconnected to the parties or the events at issue, all in disregard of Fifth Circuit precedent

---

[11] Although the district court issued its order denying TS Tech's § 1404(a) transfer motion before the Fifth Circuit issued its *en banc* decision in *Volkswagen II*, the Federal Circuit expressly noted that the "Fifth Circuit's recent en banc decision did not change any aspect of the law regarding the trial court's § 1404(a) analysis. . . ." *In re TS Tech*, at *5-6.

(*Horseshoe*, *Volkswagen I*, *Volkswagen II*). That is beyond the district court's power. *See, e.g.*, *Reiser*, 380 F.3d at 1029. Confronted with a district court not following its binding authority, the Fifth Circuit was well within its supervisory power to grant mandamus.

Finally, Petitioners urge that the use of mandamus was improper because the district court's refusal to grant a transfer under § 1404(a) is potentially subject to direct appeal following judgment. Pet. at 25-26. That argument fails for two reasons.

First, as the Fifth Circuit explained, under the harmless error rule, "a petitioner 'would not have an *adequate* remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue].'" App. at 29a (emphasis added) (quoting *In re National Presto Indus.*, 347 F.3d at 663 (Posner, J.)). *See also Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 952 (9th Cir. 1968) (holding that a petition for writ of mandamus seeking to compel a § 1404(a) transfer "is not truly an instance of piecemeal appeal" because a "decision denying change of venue is complete and final in itself" and the "error in denying change of venue cannot be effectively remedied on appeal from final judgment.").

Second, relying upon *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943), the Court in *La Buy* held that the issuance of a writ of mandamus to correct an error

by a district court that normally may be reviewed on direct appeal is not, of itself, prohibited. *La Buy*, 352 U.S. at 254-55. *La Buy* established that a court of appeals must have the power and discretion to supervise its district courts in order to prevent "a little cloud [from bringing] a flood's downpour." *Id.* at 258. That is all the more true in situations where the district court's error is persistent and repeated.

In the wake of *La Buy*, the circuits have used their discretionary supervisory authority to issue writs of mandamus in many circumstances to control their district courts. *See, e.g.*, *LaSalle Nat'l Bank v. First Connecticut Holding Group, LLC.*, 287 F.3d 279, 292 (3d Cir. 2002) (holding that the All Writs Act, 28 U.S.C. § 1651(a), authorized the court of appeals to use its supervisory power to reassign a case to a different judge on remand); *Gary H. v. Hegstrom*, 831 F.2d 1430, 1440 (9th Cir. 1987) (finding it necessary to use the supervisory power of the appellate courts to vacate a district court order, despite the fact that the "court did not abuse its discretion in entering the order"); *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) ("In recent years, however, federal courts, with the Supreme Court's approval, have come to appreciate the usefulness and flexibility of mandamus in other, less extreme, situations. In particular, mandamus has emerged as an appropriate remedy in the supervision of district courts by the various courts of appeals."); *Knight v. Alsop*, 535 F.2d 466, 469 (8th Cir. 1976) ("In this particular instance, judicial economy can be served by exercising the 'supervisory control of the District

courts . . . necessary to proper judicial administration in the federal system.'"). Consistent with these precedents, the Fifth Circuit expressly invoked its supervisory authority over the district court to issue the writ here: "Further, writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." App. at 30a.

In the final measure, mandamus is a critical tool for the courts of appeals to use in supervising and controlling district courts. Depriving the courts of appeals of the ability to correct recurring error via mandamus would give district courts license to ignore circuit precedent and would disrupt uniform application of the law within a circuit. Delaying the correction of systematic error until, at the earliest, direct appeal would create the very sort of "added delay and inefficiency" of which Petitioners complain. Pet. at 29. In view of the factual circumstances of this case, Petitioners have not presented even a close case for revisiting *La Buy* and its progeny and stripping the courts of appeals of the important supervisory tool of mandamus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANNY S. ASHBY
Counsel of Record
ROBERT H. MOW, JR.
CHRISTOPHER D. KRATOVIL
K&L GATES LLP
1717 Main Street
Suite 2800
Dallas, TX 75201
(214) 939-5500

NINGUR AKOGLU
IAN CERESNEY
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, NY 10005
(212) 471-8500

BURGAIN G. HAYES
P. O. Box 10447
Austin, TX 78766
(512) 472-2193

Attorneys for Respondents